

Date: 11/12/93

Case No.: 93-STa-4

In the Matter of

ROBERT REEMSnyder

Complainant

vs.

MAYFLOWER TRANSIT, INC.

Respondent

APPEARANCES:

Robert Reemsnyder, Pro Se
Fayetteville, Tennessee
For the Complainant

Sydney F. Frazier, Esq.
Cabaniss, Johnson, Gardner, Dumas & O'Neal
Birmingham, Alabama

and

Steven David, Esq.
Mayflower Transit, Inc.
Carmel, Indiana
For the Respondent

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), 49 U.S.C. §2305, and the regulations found at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of those rules.

STATEMENT OF THE CASE

The Complainant, Robert Reemsnyder (hereinafter "Reemsnyder"), filed the first documented complaint in this action by telephone with the Secretary of Labor, Occupational Safety and Health Administration ("OSHA") on October 21, 1991, alleging that the

Respondent, Mayflower Transit, Inc. ("Mayflower") discriminated against him in violation of §405(a) and (b) of the Act.

Reemsnyder contends that he was discharged for filing complaints with various federal and state agencies alleging violations of federal hours of service regulations and for refusing to operate his vehicle while fatigued or while the brakes were not working properly. The Secretary of Labor, acting through a duly authorized agent, investigated the complaint and on August 27, 1992, determined that Reemsnyder's Complaint was not filed timely and was without merit. (AX 4) Complainant filed objections to the Secretary's findings by way of a letter dated October 15, 1992, and requested a formal hearing before an Administrative Law Judge. (AX 8)

A formal hearing was conducted on April 27-28, 1993, in Fayetteville, Tennessee, where the parties were afforded full opportunity to present evidence¹ and argument.

ISSUES:

1. Whether Reemsnyder filed a timely complaint with the U.S. Department of Labor;
2. Whether Reemsnyder filed a timely request for hearing on his claim following the Secretary's August 27, 1992 finding that the Complaint should be dismissed; and,
3. Whether Reemsnyder was discharged as a result of having engaged in protected activity.

STIPULATIONS:

Pursuant to my prehearing order, the parties were instructed to confer and prepare a stipulation of facts which are not in dispute. (AX 24) Each party submitted a document containing what they believed to be the agreed upon stipulations, but the documents conflict. Compare AX 42 (April 15, 1993 letter of Complainant) with AX 43 (Submission of Respondent, under cover letter of April 19, 1993). The single fact stipulated to by both parties is that Reemsnyder executed a Contract Hauling Agreement ("contract") with Mayflower on June 28, 1990. (RX 1)

Based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory

¹In this decision, "CX" refers to Complainant's Exhibits, "RX" refers to Respondent's Exhibits, "AX" refers to Administrative Exhibits, and "Tr." refers to the Transcript of the hearing.

provisions, regulations and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

Extensive testimony was elicited from both sides at the hearing concerning the events leading up to the termination of Reemsnyder's contract. Reemsnyder attended a Mayflower recruiting seminar in April, 1990, filed an application, and was accepted into Mayflower's training program. (Tr. 12, 25) After a three week qualification process, Reemsnyder entered into the contract with Mayflower on June 28, 1990. (Tr. 28-29; RX 1) Upon entering into the contract, Reemsnyder began work as an owner/operator in the Household Goods ("HHG") division of Mayflower, driving a tractor he purchased with financing provided by a Mayflower subsidiary. The trailer used by Reemsnyder was owned by Mayflower. (Tr. 17-18; RX 1)

In the HHG division, the shipment process begins when a Mayflower agent accepts an order from a shipper, typically making a commitment that the order will be loaded within a certain number of days, and delivered within a second range of days. (Tr. 353-54) The order is then given to a planner, whose job is to piece together a series of orders to make up a complete load to be hauled by a van operator such as Reemsnyder. (Tr. 354) In so doing, the van operator is responsible for putting together an assignment that can be done by the van operator, taking into account hours of service restrictions², and that will be profitable for the van operator, considering the distance involved and the amount of the order. (Tr. 354-56) The assignment is then given to a dispatcher, who offers it to a van operator. (Tr. 356-57) The van operator has the option to accept or reject the assignment, based upon

²"Hours of Service" regulations are Department of Transportation (DOT) limitations on the number of hours a commercial truck driver may operate his vehicle before stopping for rest. There are three such regulations referred to in this decision. Briefly summarized, the "Ten Hour Rule" states that a driver may accumulate a maximum of ten driving hours before stopping for eight hours of off-duty time. The "Fifteen Hour Rule" applies to time spent on duty, but not driving, such as loading and unloading, etc., and requires that a driver accumulate no more than fifteen "duty hours" (which includes driving and non-driving time) before stopping for eight hours of rest. Finally, the "Seventy Hour Rule" forbids the accumulation of more than seventy total duty hours in an eight day period. These regulations are contained in Federal Motor Carrier's Safety Regulations 49 C.F.R. §395.3. (CX 2) They were further explained in the testimony of David Pile, Director of Safety at Mayflower. (Tr. 512-14)

whether he agrees the assignment can be done and will be sufficiently profitable. (Tr. 83, 357) This discretion is not unfettered, however, because the van operator must accept and perform a sufficient number of assignments to pay a large number of fixed expenses, such as monthly payments on his or her tractor, insurance, tires for both the tractor and trailer, license plates, inspections, cargo-handling equipment, tolls, tire chains, and the cost of hiring labor to assist in the loading and unloading of the truck. (Tr. 72-76)

Once an assignment is accepted, the van operator sets off for his first scheduled pickup. It is in the van operator's interest to minimize the amount of time spent traveling to a pickup point with an unloaded trailer, because compensation is based upon a percentage of the gross revenue generated by the load hauled, and typically no payment is made for mileage accumulated while unloaded.³ In Reemsnyder's case, he was paid fifty-four percent (54%) of the revenue generated by Mayflower from his assignments. (Tr. 365; RX 1) Responsibility for compliance with hours of service regulations is left completely up to the van operator, although the logs are ultimately turned into Mayflower, where a compliance review is conducted, and the operator fined one dollar per violation. (Tr. 236-41, 363) The van operator communicates with the dispatcher on a daily basis, advising him of his or her location, estimated time of arrival, and the like. Mayflower also requests that its van operators call in whenever they are forced to deviate from the original schedule, so that the shipper may be advised of any change in the pickup or delivery times. (Tr. 359-60) As independent contractors the van operators control their starting and stopping times and their calls to the dispatcher. (Tr. 428-29) Overall, the van operator is faced with a difficult task, and must put in a great deal of time and effort to maximize available driving time and to load and unload the trailer efficiently in order to make a profit, all while complying with hours of service regulations. (Tr. 441-42) Sixty to seventy percent (60-70%) of all new owner/operators fail within their first year. (Tr. 441)

Reemsnyder's problems began almost immediately upon signing the contract with Mayflower. He testified that his first hours of service problem was on a dispatch from Ann Arbor, Michigan to pick up goods in Columbus, Ohio and Rockford, Illinois in July, 1990. (Tr. 56-58) Reemsnyder testified that the dispatcher was upset with him for not arriving in Rockford until 5 p.m., and that he was expected to cover a distance of approximately 550 miles in ten hours, which was not possible, and which would force him to violate hours of service regulations. Id. Reemsnyder was apparently

³Such mileage is known as "deadheading", and occurs, for example, when a van operator unloads his trailer in city A, and must then travel empty to city B to pick up his next load. (Tr. 367)

referring to Chillicothe, Ohio, because his log for that period makes no mention of Columbus, Ohio during that period. (RX 6) According to Reemsnyder's log, he left Chillicothe, Ohio at 2:15 p.m. on July 2, 1990, and arrived in Rockford, Illinois, at 5 p.m. on July 3, 1990, twenty-six and three quarter hours later. (RX 6, log at July 2-3) Of these twenty-six and three quarter hours, eleven and one quarter hours were spent driving, fifteen were spent off duty or in the sleeper compartment, and one half hour was spent on duty, but not driving. Id. Instead of driving ten hours, and then taking eight hours off, which would have maximized Reemsnyder's driving time and complied with the ten and fifteen hour rules, Reemsnyder took off-duty breaks of two and one half and one and three quarter hours, interspersed with brief periods of driving, before stopping for his eight consecutive hours off duty. Id. Had Reemsnyder driven ten hours and taken eight consecutive hours off duty, he would have been one and one quarter hours away from Rockford, Illinois at 8:15 a.m. on July 3, 1990. Even adding three hours for necessary activities such as eating, using the rest room, and calling his dispatcher, Reemsnyder could have arrived in Rockford at 12:30 p.m., four and one half hours earlier than he ultimately arrived, while fully complying with hours of service regulations.

The second specific incident which Reemsnyder testified about, was a problem with his trailer brakes in November, 1990. (Tr. 39-56) Reemsnyder testified that on November 1, 1990, the brakes on his trailer locked up. (Tr. 42) Reemsnyder was instructed as to how to release the trailer brakes, so that the trailer could be moved to a repair shop three miles away. Id. A temporary repair was made, and Reemsnyder was instructed to take the trailer to Gainesville, Florida for permanent repairs. (Tr. 44-45) Reemsnyder testified that when he informed Mayflower dispatcher Gene Fox ("Fox") that the repair could not be made until the next day, Fox instructed him to travel to Panama City, Florida, for the next pickup, and to have the repair made there instead. (Tr. 45) Reemsnyder's log shows that he finally arrived in Panama City at 1 p.m. on November 2, 1990. (RX 6, log at November 2) After being forced to again move the trailer to a second shop in Panama City where Mayflower had an account, Reemsnyder refused to move the trailer until the brakes were repaired. (Tr. 48) However, Reemsnyder testified that the brakes were then fixed, and that no threats were made to him by any Mayflower official. (Tr. 48-49) Apparently, however, a late delivery was noted in Reemsnyder's personnel record. (Tr. 51-54) Ultimately, Reemsnyder was stranded in Panama City for almost seven days until the shop could make the required repairs. (RX 6, log at November 2-8) Once the repairs were completed, Reemsnyder drove for five hours before stopping for eight hours off duty. Id.

The next incident testified to by Reemsnyder occurred in November, 1990 in New York. (Tr. 76-87) Reemsnyder refused to accept a series of loads which he felt could not be completed

within hours of service limitations, and he testified that Mayflower respected his wishes, reassigning the loads. (Tr. 78-79) After being assigned a new load to pick up in Brooklyn, New York, Reemsnyder testified that due to traffic he was forced to park the truck far from the shipper's residence and that it ended up taking ten hours to load the shipment. (Tr. 80-85) However, Reemsnyder's logs for that period do not show any on-duty non-driving segment of more than five and one half hours. See RX 6, log at November 19-22. Reemsnyder's mother, Evelyn Schloss, who was traveling with him at the time, testified that they did not arrive at the residence until "early afternoon", that the loading took them until dark, and that Reemsnyder had trouble finding his way out of Brooklyn. (Tr. 318-19) Even accepting Reemsnyder's ten hour figure, he himself admitted that Mayflower did not force him to violate the Fifteen Hour rule that day, and that no hours of service violation occurred. (Tr. 86)

Ms. Schloss testified as to three additional problems that occurred between December, 1990 and January, 1991. (Tr. 319-35) These incidents involved delays on Reemsnyder's part due to problems with the workers, weather conditions, conditions at the shippers' residences, and traffic conditions. Id. However, none of these incidents involved any refusal to operate or safety complaint by Reemsnyder. The only testimony concerning Mayflower's reaction to these incidents was the fact that Reemsnyder's dispatcher, Fox, became angry with Reemsnyder over the delays and complained about his tendency to begin working later in the day. (Tr. 321, 327) Since none of these incidents involved any threatening or discriminatory action by Mayflower related to protected activity, they are of little help to Reemsnyder in carrying his burden of proof.

In February, 1990, after an incident in Bloomfield Hills, Michigan, Reemsnyder's contract was cancelled for the first time. Reemsnyder called Mayflower dispatch upon arrival, and told his dispatcher, Fox, that he lacked sufficient hours of service to complete the deliveries. (Tr. 92) Reemsnyder testified that Fox attempted to persuade Reemsnyder to go off duty while hired help unloaded the truck, but that he was hesitant, due to the fact that he would remain liable for any loss or property damage occurring during the unloading. (Tr. 92-94) Reemsnyder became embroiled in a dispute with the helpers over their pay and their refusal to provide Reemsnyder with a valid address, with one of the men actually pulling a knife and threatening to disable the truck. (Tr. 95-98) A police report was made, and Reemsnyder reported the incident to Mayflower in a "Van Operator Questionnaire" which he submitted. (CX 10) Reemsnyder's log does not support his contention of an impending violation, however. On February 15, 1991, the day in question, Reemsnyder went on duty at 10:45 a.m., following thirteen and three quarter hours off duty. (RX 4, log at February 14-15) He arrived in Bloomfield Hills at 2:15 p.m., after logging two and one half hours driving time and one hour of

time on duty but not driving. Id. At that point, Reemsnyder could have driven seven and one half hours under the Ten Hour rule, and under the Fifteen Hour rule, he had eleven and one half total duty hours available before he would have been prevented from driving. See CX 2, DOT Safety Regulations, 49 C.F.R. §395.3. Under the Seventy Hour rule, Reemsnyder had six and three quarter duty hours available in the eight day period ending February 15, 1991. Id. It is not clear from Reemsnyder's testimony, but apparently he followed Fox's advice on this occasion, because his log shows that he remained on duty until 3 p.m., went off duty until 10 p.m., and then returned to duty for one half hour, after which he drove to Ann Arbor, Michigan, where he went off duty for forty and one half consecutive hours. (RX 4, log at February 15-17; Tr. 102. See also CX 10 (Van Operator Questionnaire, in which Reemsnyder complains of agent's helpers wanting him to unload after he had been relieved of duty due to lack of available hours)). In the questionnaire he returned to Mayflower, Reemsnyder for the first time mentioned the federal "Whistleblower" statute. (CX 10) However, the entire discussion was in the context of his dispute with the helpers, and Reemsnyder made no mention of any alleged hours of service or safety violations.

It was at this point that Reemsnyder returned to Mayflower in Indianapolis, for what he believed would be a transfer to the Electronic Dispatch Fleet (EDF). (Tr. 102-03) Upon arrival, however, Joe Sida ("Sida"), who was the Fleet Manager for Mayflower at the time, told Reemsnyder his contract was being cancelled, and Mayflower attempted to repossess the tractor. (Tr. 103-05) Reemsnyder himself testified that Sida told him his contract was being cancelled due to the problems with the Bloomfield Hills shipment. (Tr. 109) Reemsnyder appealed the cancellation to Tim Wiley ("Wiley"), Vice-President of HHG, and Wiley reinstated the contract. (Tr. 111)

The parties' accounts of the conditions of reinstatement vary dramatically, however. Reemsnyder testified that Wiley agreed to reinstate the contract if Reemsnyder agreed to be where the company wanted him to be, at the scheduled time, regardless of whether an hours of service violation would result, and to cease calling various departments of Mayflower whenever a dispute arose. (Tr. 111) Reemsnyder testified that he did not object to the conditions, for fear that his contract would be cancelled. (Tr. 113) Wiley, on the other hand, testified that no discussion of hours of service or safety regulations occurred. (Tr. 371-72) Instead, Wiley claimed he discussed Reemsnyder's tendency to begin work late in the morning, and encouraged Reemsnyder to start work earlier to better satisfy customers and to obtain the higher quality labor which is available earlier in the day. (Tr. 370) He claims to have overridden the cancellation based upon Reemsnyder's promise to work harder to run a successful operation. (Tr. 371) With his contract reinstated, Reemsnyder continued operating for Mayflower until April, 1991. In early April, he became involved in a dispute

with a Mayflower agent over Reemsnyder's parking his rig on the agent's property. (Tr. 89; RX 4, log at April 4-5) After arguing with the agent, Reemsnyder refused to load the shipment, and left. (Tr. 90) Reemsnyder refused the dispatcher's request to return for the load, and continued on with his remaining shipments. (Tr. 90-91)

The challenged event in this case, the termination of Reemsnyder's contract, arose out of the events occurring on April 12, 1991. However, there is some dispute as to the actual date of termination. Reemsnyder testified that on April 9, 1991, while on his way to a delivery at South Amboy, New Jersey, he was delayed by a breakdown caused by a broken coolant hose. (Tr. 114) Reemsnyder's log for that day corroborates his testimony, evidencing a four and one half hour delay. (Tr. 114-16; RX 4, log at April 9) Upon his arrival in South Amboy, Reemsnyder was further delayed by a dispute with the shipper over the acceptance of an uncertified check. (Tr. 117-19) This dispute ultimately resulted in an overnight delay, until a certified check could be obtained. (Tr. 119-20) These delays rendered it impossible for Reemsnyder to arrive at his next scheduled pickup, in Bluefield, Virginia, at the originally estimated time of 8 a.m. on April 12, 1991, due to hours of service regulations. However, Richard Bowman ("Bowman"), who had replaced Fox as Reemsnyder's dispatcher, testified that the 8 a.m. figure had been established several days earlier, prior to Reemsnyder's problems on the South Amboy leg of the trip. (RX 9, Deposition of Bowman, at 16) Reemsnyder's testimony supports Bowman's assertion, as he stated on at least two occasions that the dispatch was made prior to his problems in South Amboy. (See Tr. 120 ("[D]ue to the fact they'd previously given me this dispatch prior to arrival in South Amboy . . . there was no way I could be [in Bluefield] within . . . the driving time was (sic) that I had available"; Tr. 639 "Q: [H]ow much time did you have to get [from] South Amboy to Blue Field (sic)? . . . A: I had plenty of time on the day that I arrived in South Amboy, New Jersey, assuming I could have unloaded on that day, there would have been no problem getting there."))

Reemsnyder attempted to meet the 8 a.m. arrival time, driving ten and one half hours before stopping in Roanoke, Virginia to rest.⁴ (Tr. 121-22; RX 4, log at April 12) After nine and one half hours off duty, Reemsnyder called Bowman, his dispatcher, at approximately 10 a.m. (Tr. 645; RX 4, log at April 12) Following his initial conversation with Reemsnyder, Bowman called the shipper and informed him that, based upon the time and distance, Reemsnyder would cover the approximately 100 miles and arrive in Roanoke between 12 and 1 p.m. (RX 9, Deposition of Bowman, at 11) According to his log, Reemsnyder left Roanoke at approximately

⁴By driving ten and one half hours without eight hours off duty, Reemsnyder violated the Ten Hour rule.

10:30 a.m., and drove one and one half hours to Wytheville, Virginia, where he stopped at a truck stop to get fuel, weigh the truck, and eat lunch. (RX 4, log at April 12) Reemsnyder spent an additional hour fueling and weighing the rig, and again called Bowman. (Id.; Tr. 123, 646-47) Reemsnyder testified that Bowman was angry by this point, and wanted Reemsnyder to get to the shipper's residence as soon as possible. (Tr. 123, 648) Instead of leaving immediately, however, Reemsnyder ate lunch at the truck stop, and finally set out for Bluefield at 1:30 p.m. (Id.; RX 4, log at April 12)

The shipper lived outside the city limits, apparently in a mountainous area, and Reemsnyder got lost attempting to find the house. (Tr. 124, 648-49) Reemsnyder was forced to stop and call the shipper, who drove to meet Reemsnyder, so that Reemsnyder could follow him to the house. (Tr. 649-50) Reemsnyder finally arrived at approximately 3 p.m. (Tr. 650) His problems continued, however, because he could not get the truck to negotiate the turn leading up to the shipper's house. (Tr. 124, 652) After spending approximately one half hour trying to get the truck to the house, Reemsnyder received a call at the shipper's house from Joe Sida ("Sida"), the Planning Director in Mayflower's HHG division. (Tr. 126, 652) The parties agree that Sida instructed Reemsnyder not to load the shipment, to return to the truck stop and call Sida back. (Tr. 126-27, 652-53; RX 8, Deposition of Sida, at 13)

The parties' accounts of the ensuing conversation between Sida and Reemsnyder vary dramatically. Reemsnyder testified that Sida informed him that his contract was being cancelled, and that he was to bring the tractor and trailer to Indianapolis by the following Monday morning. (Tr. 128, 654) Sida, on the other hand, testified in a deposition that the shipper became so angry at Reemsnyder's late arrival that he refused to allow him to load the shipment. (RX 8, Deposition of Sida, at 12-13) Sida maintains that he merely instructed Reemsnyder to return to Indianapolis for "counseling", and that the decision to terminate the contract was not made until after Reemsnyder failed to return for counseling.

Reemsnyder contends that his contract was terminated due to his refusal to violate DOT hours of service regulations in order to arrive in Bluefield at 8 a.m. on April 12, and for his filing complaints with various federal and state agencies in the months preceding his termination, detailing what he believed to be safety violations on the part of Mayflower.

B. Conclusions of Law

Whether Reemsnyder Filed a Timely Complaint with the U.S. Department of Labor

The STAA limits the filing of a complaint under the Act to a period of 180 days following the event which is alleged to have

violated the Act. 49 U.S.C. §2305. In whistleblower cases, it has been held that the time for filing a complaint begins running "at the time of the challenged conduct and its notification". English v. Whitfield, 858 F.2d 957, 961 (4th Cir. 1988). There is some dispute as to when Reemsnyder's contract was terminated. Reemsnyder contends that Sida informed him over the phone on April 12, 1991 that his contract was being cancelled, and told him to return to Indianapolis to surrender the tractor and trailer. (Tr. 128, 654) Sida, on the other hand, testified in deposition that on April 12, 1991, he merely instructed Reemsnyder not to load the truck and to return to Indianapolis for counseling. (RX 8, Deposition of Sida, at 12-13) Sida admitted, however, that he told Reemsnyder on April 12, 1991 that cancellation was a "possibility". (Id., at 14) Reemsnyder testified that in February, 1991, he felt Mayflower's alleged agreement to transfer Reemsnyder to the EDF was, in reality, simply a ruse to get him to return to Indianapolis to repossess his tractor. (Tr. 104-05) Reemsnyder also testified that, based upon his February, 1991 experience, he "knew. . . what was going to happen". (Tr. 130) For this reason, Reemsnyder chose not to return to Indianapolis as instructed, and instead remained in possession of the tractor for a year, until April, 1992. (Tr. 134-35)

Wiley, the Vice President of HHG, testified at the hearing that he had concurred in Sida's decision to call Reemsnyder in for counseling. (Tr. 459-60) I find the most likely explanation for this apparent contradiction to be that Reemsnyder, based upon his February, 1991 experience and Sida's threat of cancellation, understood the order to return to Indianapolis to be the equivalent of a cancellation. Such an interpretation is consistent with Reemsnyder's subsequent failure to return to Indianapolis.

Sida and Wiley both testified that upon Reemsnyder's failure to return to Indianapolis, the decision to cancel his contract was made on April 16, 1991. (Tr. 461; RX 8, Deposition of Sida, at 15) They both also testified that the notice of cancellation was not ultimately mailed to Reemsnyder until April 18, 1991. Id. A cancellation letter dated April 18, 1991 is attached to Sida's deposition as an exhibit. Based on all of these considerations, I find that the cancellation of Reemsnyder's contract occurred on April 18, 1991.

From April 18, 1991, the 180 day period for filing a complaint ended on October 15, 1991. The record contains a memorandum of a reported complaint to an OSHA investigator taken over the phone on November 1, 1991. (AX 2) However, the same memorandum lists October 21, 1991 as the date of filing in a different section. The Regional Administrator of OSHA relied upon the October 21, 1991 date in making his finding that Reemsnyder's complaint was not filed within the 180 day filing period. (AX 4) The record also contains a letter dated October 11, 1991 from Jim Sasser, a United States Senator from Tennessee, to OSHA, making reference to a

complaint previously filed by Reemsnyder against Mayflower. (AX 1) Complainant testified that he initially contacted OSHA by phone in July, 1991, after finding out that OSHA has jurisdiction over §2305 of STAA. (Tr. 163-64; 172) He stated that after waiting thirty days for OSHA to get back to him, he became worried about the 180 day limitations period, and contacted Senator Sasser's office, which in turn generated the October 11, 1991 letter to OSHA. (Tr. 163-64) Prior to contacting OSHA, Reemsnyder had filed a complaint with DOT, and claims to have been under the impression that DOT would pursue his §2305 claim if they were to substantiate his allegations of safety violations. (Tr. 170-71) Reemsnyder further testified that, following Senator Sasser's letter, OSHA contacted him to begin an investigation, and claimed that his initial inquiry had been lost, resulting in the delay. (Tr. 176)

The regulations concerning the filing of a §2305 complaint provide, in relevant part, as follows:

(a) Who may file. An employee may file, or have filed by any person on the employee's behalf, a complaint alleging a violation of section 405.

(b) Nature of Filing. No particular form of complaint is required.

* * *

(d) Time for filing. (1) Section 405(c)(1) provides that an employee who believes that he has been discriminated against in violation of section 405(a) or (b) " * * * may, within one hundred and eighty days after such alleged violation occurs," file or have filed by any person on the employee's behalf a complaint with the Secretary.

* * *

(3) However, there are circumstances which will justify tolling of the 180 day period on the basis of recognized equitable principles or because of extenuating circumstances

29 C.F.R. §1978.103.

Since Reemsnyder's testimony is both credible and uncontradicted in the record, I find that his phone contact with OSHA in July, 1991 is sufficient to comply with the generous language of the regulation, which requires no particular form of complaint. Several factors corroborate Reemsnyder's testimony.

First, the October 11, 1991 letter from Senator Sasser referencing a previously filed OSHA complaint, and its timing both support Complainant's testimony that he contacted Senator Sasser after OSHA failed to follow up his complaint. (AX 1) In addition, Reemsnyder's testimony that OSHA claimed to have lost the complaint on two occasions is plausible, in that it explains the conflicting

dates contained on OSHA's memorandum concerning the complaint. (Tr. 176; AX 2) Furthermore, in light of the language of the regulation permitting the filing of a complaint on behalf of an employee and the difficulties facing a pro se complainant such as Reemsnyder, I find Senator Sasser's October 11, 1991 letter to be sufficient in and of itself to constitute a filing within the 180 day period. 49 U.S.C. app. §2305(c)(1); 29 C.F.R. §1978.102(a), (d); AX 1. Finally, equitable tolling has been found to be proper in whistleblower cases where a complainant has raised the statutory issue in question, but has done so in the wrong forum. See Ellis v. Ray A. Schoppert Trucking, 92-STA-28 (Sec'y Sept. 23, 1992), citing School District of City of Allentown v. Marshall, 657 F.2d 16 (3d Cir. 1981). In this case, Reemsnyder's mistaken belief that DOT would also pursue his §2305 claim if it substantiated his allegations of safety violations would justify an equitable tolling of the 180 day period for an additional six days, until October 21, 1991, which is the first date upon which OSHA documented Reemsnyder's claim. (Tr. 170-71, 227; AX 2) For all of these reasons, I find Reemsnyder's complaint against Mayflower to have been timely filed.

Whether Reemsnyder Filed a Timely Request for Hearing on his Claim Following the Secretary's August 27, 1992 Finding That the Complaint Should Be Dismissed

With regard to the request for hearing, the regulations provide that the parties have thirty days following the receipt of the preliminary findings of the Assistant Secretary in which to object to the findings and request a hearing before an Administrative Law Judge. 29 C.F.R. §1978.105(a). In Reemsnyder's case, the Assistant Secretary issued his finding on August 27, 1992 that Complainant's §2305 complaint was not filed in a timely manner. (AX 4) A cover letter of the same date informed Reemsnyder of the thirty day period for filing an appeal. (AX 6) Reemsnyder's request for a hearing was not made until October 15, 1992. (AX 8) Prior to the hearing, Mayflower filed a Motion to Dismiss, based in part on the failure of Reemsnyder to request a hearing within the allotted time. (AX 43) Reemsnyder produced evidence, in the form of a signed certified mail receipt, that he did not receive the Assistant Secretary's findings until September 17, 1992. (AX 11)

At the hearing, Mayflower renewed its Motion to Dismiss based on the alleged untimely filing of the original complaint. (Tr. 155-81) However, Mayflower chose not to renew its motion as to the timeliness of the appeal when offered the chance to do so at the hearing. (Tr. 181-82, 613-14) In any event, I find the evidence produced by Complainant in response to my Order to Show Cause and offered into evidence at the hearing sufficient to show that his request for a hearing was indeed filed within thirty days of his receipt of the Assistant Secretary's findings. See AX 11.

Whether Reemsnyder was Discharged as a Result of Having Engaged in Protected Activity

Reemsnyder bears the initial burden of establishing a prima facie case of retaliatory discharge, which raises an inference that protected activity was likely the reason for the adverse action. Once successful, the burden of production shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for its employment decision. If the Respondent rebuts the inference of retaliation, the Complainant then bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination. Moon v. Transport Drivers, Inc., 836 F.2d 226 (6th Cir. 1987).

To establish a prima facie case of retaliatory discharge, the Complainant must prove that he engaged in protected activity, that he was the subject of adverse employment action, that his employer was aware of the protected activity, and that there was a causal link between his protected activity and the adverse action of his employer. Id. The evidence produced must be sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Osborn v. Cavalier Homes of Alabama, Inc., 89-STA-10 (Sec'y July 17, 1991). Section 2305 provides:

(a) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

(b) No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from

the employer, and been unable to obtain, correction of the unsafe condition.

Protected Activity

Under subsection (a) of §2305, protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C. app. §2305(a). See also Reed v. National Minerals Corp., 91-STA-34 (Sec'y July 24, 1992); Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y March 18, 1987).

This record is replete with contentions by Reemsnyder and Mayflower management that Reemsnyder complained regularly about a wide variety of employment matters, including safety concerns. In particular, the record contains testimony by Reemsnyder of his concerns that numerous loads assigned to him during his ten month tenure with Mayflower involved pickup and delivery schedules which could not be met without violating DOT hours of service regulations. These concerns were made known by Reemsnyder to his dispatchers at Mayflower, including Fox and Bowman. See, e.g., Tr. 65, 78-79, 94. On at least one occasion, Reemsnyder directly approached David Pile ("Pile"), Mayflower's Director of Safety, to complain about the dispatching practices of Fox. (Tr. 66-68, 77-79). Complainant's log contains an entry dated March 1, 1991 in which Reemsnyder notes that Bowman ordered a series of deliveries to be made on that date which Reemsnyder believed would result in an hours of service violation. (RX 4, log at March 1) Reemsnyder noted that he had informed Bowman the previous day that he had eight and three quarter hours available for March 1st. Id. At 11:45 a.m. on March 1st Reemsnyder had exhausted his available duty hours, and all of his continued driving until 4 p.m. that day was in violation of the Seventy Hour rule. I find that this log entry constitutes a complaint within the meaning of §2305(a), as these logs were submitted to Mayflower, as required by law. A similar notation appears on Reemsnyder's March 5th log, although no hours of service violation occurred on that day. (RX 4, log at March 5) A third notation appears on Reemsnyder's April 3rd log, complaining of an order of two pick ups made by Bowman. (Id., at April 3) A violation of the Fifteen Hour rule occurred on that day. Id. The last two such notations appear on the logs for April 10th and 12th, but no hours of service violations occurred on either of those days. (Id., at April 10 and 12)

The record also contains evidence of various complaints filed with governmental agencies concerning alleged violations of safety rules. Only four such complaints, however, were made prior to the termination of Reemsnyder's contract on April 12, 1991. The earliest complaint was made on March 19, 1991, after a dispute between Mayflower and Reemsnyder over whether a driver may comply

with hours of service regulations by going off duty while hired labor unloads his trailer. (Tr. 616-17, 634; CX 5) Reemsnyder filed a second complaint with DOT on March 28, 1991. (Tr. 634-35) On April 5, 1991, Reemsnyder's mother filed a request for an interpretation of various DOT rules (Tr. 636; CX 4), and a similar letter was sent by Reemsnyder to DOT on April 6, 1991. (Tr. 636) I find that the latter two items, beings mere requests for interpretations, do not constitute complaints within the meaning of the Act and are not protected activity. I find that the remainder of the complaints, however, both to the regulatory agencies and the internal complaints to Mayflower management, did constitute protected activity.

Section 405(b) of the STAA prohibits discriminatory treatment of employees for refusing to operate a vehicle because of the employee's reasonable apprehension of serious injury to himself or to the public due to the unsafe condition of such equipment. 49 U.S.C. app. §2305(b). This ground for refusal to drive also requires that the unsafe condition causing the employee's apprehension of injury must be such that a reasonable person, under the circumstances, would perceive a bona fide hazard and the employee must have sought from his employer, and been unable to obtain, correction of the condition. Reed v. National Minerals Corp., 91-STA-34 (Sec'y July 24, 1992). The record contains evidence of only one occasion on which Reemsnyder refused to drive until repairs were made, which occurred in November, 1990, in Panama City, Florida. (Tr. 46-48) Reemsnyder's own admission, however, establishes that upon his refusal to move the trailer, the brakes were in fact permanently repaired, and that no one from Mayflower threatened him at the time. (Tr. 48-49) Therefore, the "reasonable apprehension" clause of §2305 is inapplicable in this case.

The employee protection provision of the STAA also prohibits an employer from discharging or disciplining an employee for refusing to operate a motor vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety. Boone v. TFE, Inc., 90-STA-7 (Sec'y July 17, 1991). The "federal violation" clause is not triggered, however, unless there is proof of a work refusal. The record contains evidence of two occasions on which Reemsnyder refused to accept a dispatch. (Tr. 78-91) One of these refusals, however, concerned a dispute with an agent, and was unrelated to safety concerns. (Tr. 89-91) The other concerned a refusal to accept a dispatch in New York due to Reemsnyder's fear it would result in a violation of DOT's "fatigue rule".⁵ Tr. 78-79; CX 2, DOT Safety Regulations 49 C.F.R. §392.3. Reemsnyder testified that upon this refusal, Pile immediately removed all the loads, and

⁵Refusal to operate a vehicle due to fatigue constitutes protected activity. Self v. Carolina Freight Carriers Corp., 91-STA-25 (Sec'y Aug. 6, 1992).

Reemsnyder was assigned a new load. (Tr. 79-80) However, the requirement that the employee seek corrective action from his employer and be unable to obtain it, limits only the "reasonable apprehension" clause. Hadley v. Southeast Coop. Serv. Co., 86-STA-24 (Sec'y June 28, 1991). Therefore, I find that Reemsnyder's refusal to accept the New York dispatch likewise constitutes protected activity.

Adverse Employment Action and Causal Relationship

Respondent, Mayflower, took adverse employment action against Reemsnyder when it terminated his contract on April 18, 1991. A complainant must prove that the employer was aware of the protected activity when it took the adverse employment action, and he or she must raise an inference of causation, thus establishing a prima facie case of retaliatory discharge. Osborn v. Cavalier Homes of Alabama, supra. The Complainant testified that Mayflower had no formal notice prior to his termination of any of the complaints he had filed with regulatory agencies. (Tr. 619-31) The Complainant contended, however, that Mayflower had notice of his intent to file a complaint with DOT due to his noting such an intent on a Quality Control report he submitted to Mayflower. (Tr. 620-21, 636) The Quality Control report of record contained reference to an intent to file a complaint with the Internal Revenue Service (IRS) and the Immigration and Naturalization Service (INS). (CX 10) However, that report dealt with a dispute between Reemsnyder and his hired labor, and was unrelated to any safety issue. Therefore, I find it insufficient to constitute notice to Mayflower of any safety complaint, and further find that Mayflower had no knowledge of any of the formal complaints filed with DOT by Reemsnyder prior to the termination of the contract. The causation element of the prima facie case is not established when an employer has no knowledge of the protected activity. Gay v. Burlington Motor Carriers, 92-STA-5 (Sec'y May 20, 1992).

However, by the very nature of his direct communication with Mayflower, I find that Mayflower did have knowledge of the remainder of Reemsnyder's protected activity, namely the internal complaints concerning hours of service violations expressed to Fox, Bowman, and Pile, the logs alleging violations by Bowman submitted to Mayflower, and the one instance in which Reemsnyder refused to accept a dispatch due to the fatigue rule. Based upon Mayflower's awareness of the protected activity engaged in by Reemsnyder, and the proximity of the submission of the March 1 and April 3, 1991 logs noting alleged dispatches in violation of hours of service regulations to the termination, I find that Complainant has raised an inference that the protected activity was likely the reason for the adverse employment action, and has therefore established a prima facie case that his termination was motivated by his protected activity.

Rebuttal and Pretext

Since Reemsnyder has established a prima facie case of unlawful employment discrimination, the burden of production now shifts to Mayflower to establish a legitimate, nondiscriminatory reason for having terminated the contract. Mayflower argues that Reemsnyder's contract was not terminated for any refusal to drive or for safety-related complaints to management, but for his late arrival in Bluefield, Virginia on April 12, 1991, his failure to return to Indianapolis for counseling in regard to his problems with customer service, poor communication with his dispatcher, and his growing debt to Mayflower. Each of the three Mayflower employees involved in the termination either testified or were deposed concerning the reasons for the termination.

Sida, the Fleet Manager, stated in a deposition that Reemsnyder was terminated due to "very poor" performance as a van operator, his failure to make timely pickups and deliveries, poor customer relations, and his debt to Mayflower. (RX 8, Deposition of Sida, at 10-17) Sida characterized Reemsnyder as a "lazy individual" who was unwilling to put forth the effort needed to succeed as an owner/operator. (Id. at 11) Sida admitted that he was aware of Reemsnyder's log notations concerning Bowman, but denied that it was a factor in his decision. (Id. at 18) Bowman, the dispatcher, stated that Reemsnyder's performance was the poorest of the thirty to thirty-five drivers he oversaw. (RX 9, Deposition of Bowman, at 20) Bowman also noted customer complaints, failure to meet pickup and delivery time frames, and a growing deficit to Mayflower on his tractor and expenses. (Id., at 19-21) Wiley, the Vice President of HHG who had previously reinstated Reemsnyder's contract in February, 1991, noted that all of the same factors, plus Reemsnyder's failure to return to Indianapolis for counseling, led him to concur in the decision in April, 1991. (Tr. 375)

The evidence of record provides support for each of these alleged nondiscriminatory reasons for termination of the contract. As detailed previously in this decision, Reemsnyder's own testimony describes a pattern of mishaps and failures to meet pickup and delivery time frames which was continuous throughout his ten month tenure at Mayflower. Reemsnyder's log supports the testimony of Wiley and Pile to the effect that Reemsnyder's habit of starting work late in the morning led to frequent problems with customer satisfaction. The testimony of Reemsnyder's own mother even supports this assertion. See Tr. 289 ("You [Reemsnyder] picked up on the days that were required to be picked up. Maybe not at 9:00 in the morning, but you definitely had your pickup days on schedule.") The problem with pickups and deliveries was further exacerbated by Reemsnyder's failure to maximize his available driving time. Most of the hours of service violations which occurred were of short duration, fifteen to thirty minutes, and most could have been avoided by simply planning so that operations

could be ended fifteen or thirty minutes earlier. The logs also evidence a tendency to take significantly more than the required eight hours off duty, frequently in chunks of twelve to twenty-four hours. Not all of Mayflower's solutions to Reemsnyder's hours of service problems are viable, however, because although they comply with the Ten and Fifteen Hour rules, they fail to take into account the Seventy Hour Rule's limitations. The Seventy Hour rule greatly limits the ability of a driver to alternate periods of ten driving hours and eight off-duty hours. Nevertheless, Reemsnyder failed to produce evidence of even one occasion on which he was given a dispatch so stringent that, had he better planned his hours of service, he still could not have complied with all three rules. Furthermore, there are also several points in the logs where Reemsnyder notes off-duty periods of more than one, but less than eight, hours, which are of no help in complying with hours of service limitations and which impede maximization of driving time.

The record also supports Mayflower's allegations of poor customer relations and failure to communicate with dispatchers. Reemsnyder's testimony includes accounts of disputes with customers, Mayflower agents, and hired laborers. See, e.g., Tr. 88-89. Reemsnyder repeatedly made reference to the fact that he is an independent contractor having control over his starting times and his calls to dispatchers. Although this may be true, he apparently failed to see that abuse of that flexibility can drastically impair customer service, which is a critical consideration in any competitive, consumer-oriented business such as the moving industry. See, e.g., Tr. 428-29, 446-47. As to communicating with his dispatchers, Reemsnyder's account of the events leading up to termination of his contract supports the assertions made by the Mayflower decisionmakers. Reemsnyder testified that he originally called in at 10 a.m. on April 12, 1991, to inform the dispatcher he was not yet in Bluefield. (Tr. 122) When asked how far away from Bluefield he was, Reemsnyder testified that he replied: "I don't know. I'll get there when I get there. Maybe 100 miles." Id. Later, Reemsnyder stopped at a truck stop to get fuel, not far from Bluefield, where he again called his dispatcher, Bowman. (Tr. 647) Reemsnyder testified that Bowman was already upset with him, and urged him to hurry over to the shipper's house, as he was already behind schedule. Reemsnyder described his response as follows: "He didn't like [the fact that Reemsnyder was stopping to eat lunch], and he immediately started arguing with me, but I didn't say anything to him. I just hung up the phone, I got my sandwich, I ate it, and then I went over to the shipper's place." (Tr. 648)

Finally, the record, including Reemsnyder's own testimony, also supports Mayflower's assertion that Reemsnyder was operating at a deficit, which was growing at the time the contract was cancelled. (Tr. 200, 462) Reemsnyder testified throughout the hearing that this deficit was due to a lack of profitable loads being given to him by Mayflower, and goes so far as to allege a conspiracy on the part of Mayflower to cause him to fail finan-

cially so that his tractor could be repossessed and resold. (Tr. 200, 205) Whatever the source of Reemsnyder's financial difficulties, the fact remains that his deficit was growing at the time of termination, and constitutes a legitimate, nondiscriminatory justification for the termination. Based on all of these considerations, I find that Mayflower has rebutted the inference of retaliation.

Mayflower having rebutted the inference of retaliation, it is now incumbent upon Reemsnyder to demonstrate by a preponderance of the evidence that the legitimate reasons asserted by Mayflower were pretextual. Simply stated, I find that Reemsnyder has failed to produce any substantial evidence which tends to show that Respondent's asserted reasons for the termination are unworthy of belief. The Complainant has gone to great lengths to establish that hours of service violations occurred during the term of his contract with Mayflower, and these violations are noted. However, hours of service violations, alone, are insufficient to meet Complainant's burden of proving a retaliatory discharge under §2305. They are, however, related to Reemsnyder's theory of the case.

Reemsnyder's argument, ultimately, is that the events on April 12, 1991 with regard to the Bluefield incident served as a pretext for the real reason his contract was terminated, namely his engaging in protected activity. As has been extensively developed, Reemsnyder's protected activity consisted of his internal complaints regarding the dispatching practices of Fox and Bowman, including those noted in his logs, and his refusal to accept a dispatch on one occasion due to belief that he would violate the fatigue rule as a result.

Reemsnyder's theory centers around a discussion he had with Wiley in February, 1991, in which Reemsnyder alleges Wiley agreed to reinstate his contract on the condition that Reemsnyder arrive at his pickups and deliveries at the scheduled times, regardless of whether it would require hours of service violations. (Tr. 111) I find it likely that hours of service were discussed at this meeting, and perhaps that Wiley encouraged Reemsnyder to make a greater effort to maximize his hours of service, but I conclude that Reemsnyder's allegation of an ultimatum requiring hours of service violations is not borne out by the evidence. Reemsnyder's testimony on this issue was contradictory. When asked if he had ever been told to drive beyond hours of service, Reemsnyder replied: "Well, not in those words but I've been dispatched in terms of distances that are obviously beyond speed limit rules for the state." (Tr. 56) Reemsnyder later stated that he was never required to travel from point A to Point B within ten hours, regardless of the mileage involved, but stated that it was "understood". (Tr. 60)

As I have previously found, the only complaints regarding hours of service violations of which Mayflower personnel had notice

at the time of the termination were the logs he submitted with remarks concerning Bowman's dispatching practices, and a conversation with Pile concerning the same subject. Hours of service violations actually occurred on only two of the days on which Reemsnyder made notes in the logs. Reemsnyder alleges that Mayflower had knowledge of a formal complaint filed with DOT on March 19, 1991 by means of a quality control report he submitted, but the evidence does not support this contention. The only quality control report in evidence fails to mention hours of service of the DOT. (CX 10) Reemsnyder alleged that an earlier such report exists, but failed to produce it at the hearing. (Tr. 145-50) Complainant was given twenty days post-hearing to submit the document, but failed to do so. In response to Reemsnyder's request, the Regional Solicitor and OSHA each submitted copies of the quality control report Reemsnyder had sent them, but both were copies of the same documents already in the record.

As to Complainant's other protected activity, namely his refusal to accept a dispatch in Albany, New York in November, 1990, I find this to have been a non-factor in his termination as well, for two reasons. First, its remoteness in time to Reemsnyder's actual contract termination suggests it did not have a significant effect on Mayflower's decision. This incident took place prior to Sida's initial attempt to terminate Reemsnyder's contract in February, 1991, yet Wiley chose to override the decision and give Reemsnyder a second chance. Secondly, by Reemsnyder's own admission, Pile, the Safety Director, immediately removed all of the loads without argument, and Reemsnyder was assigned another load. (Tr. 79)

In evaluating the entire record, I conclude that the overwhelming weight of the evidence demonstrates that the reasons advanced by Mayflower for the termination of Reemsnyder's hauling contract are legitimate and not pretextual. The evidence in this case is susceptible to no conclusion but that Mayflower would have reached the same employment decision even in the absence of the protected activity in which Complainant engaged.

RECOMMENDED ORDER

WHEREFORE, IT IS RECOMMENDED that the complaint of Robert R. Reemsnyder be DISMISSED.

DANIEL J. ROKETENETZ
Administrative Law Judge

